Katihar Jute Mills Ltd. Vs Calcutta Match Works (India) Ltd. and Another

Court: Patna High Court

Date of Decision: July 13, 1957

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 14 Rule 1, Order 7 Rule 7
Evidence Act, 1872 â€" Section 115, 63, 63(4), 63(5)
Transfer of Property Act, 1882 â€" Section 53A, 54, 8

Citation: AIR 1958 Patna 133

Hon'ble Judges: Kanhaiya Singh, J; Ahmad, J

Bench: Division Bench

Advocate: P.R. Das, Nandlal Untwalia and Hari Lall Agarwal, for the Appellant; Mahabir Prasad, General and A.K. Mitter, for the Respondent

Final Decision: Allowed

Judgement

Ahmad, J.
In the suit, which has given rise to this appeal, the sole plaintiff, who are a private limited concern, with their registered office at

3 Chandmari Road, Calcutta, seek reliefs for declaration of title and recovery of possession in respect of lands specified in Schedules B and C of

the plaint along with structures standing thereon and in the alternative for a sum of Rs. 90,000/- as also for some other incidental claims. The suit

was tried by Mr. Chandra Mouleshwar Prasad, Additional Subordinate Judge, Purnea. He in his opinion came to the conclusion that though, as

admitted by the parties, the title in the lands originally lay with the plaintiff and the claim for it was not barred by time and though there was no

conveyance of sale in favour of the contesting defendant, who are also a private limited concern, executed and registered by the plaintiff, as

contemplated by Section 54 of the Transfer of Property Act, they in their possession were protected by the doctrine of part performance, as

provided in Section 53A of the Transfer of Property Act and accordingly he dismissed the suit by his judgment and decree dated the 28th January,

1956.

Therefore the plaintiff have now come in appeal and it has been pressed in this Court mainly on two grounds (1) that the finding of the trial Court

on the question of part performance cannot be supported either in law or on facts as they stand on the record and (2) that therefore, the trial Court

in any case should have allowed the relief for possession, if not on the alleged contract dated 7th June, 1944, at least on the footing of the admitted

title. In my opinion, both these two points are unassailable. But it does not mean that the case on the footing of the alleged contract dated 7th June,

1944 has not been stressed at all.

On the other hand, Mr. Das appearing for the plaintiff has advanced some contention on that ground also though it must be said to his credit that

not with the same vehemence and I think rightly for that is not borne out by the evidence on the record and, therefore to that extent the judgment of

the trial Court has to be left undisturbed.

2. The area of Schedule B land is 20 bighas, 12 kathas and 8 dhurs and that of Schedule C land 4 bighas, 12 kathas and 10 dhurs and they

together with another area of 2 bighas and 1 katha from one block lying at Katihar by the side of the plaintiff"s Jute Mills there. It is the admitted

case of the parties that this entire block of land was originally acquired by the plaintiff company on 9th April 1935 in the form of dar mokarrari

lease from one Hajia Bibi in the name of their the then Manager Radha Kishun Chamaria, who has been impleaded on the record of this case as

the second defendant.

3. At that time and till long thereafter the shares of the plaintiff company were all owned and held in fact only by the three Chamarias, namely, (1)

Radha Kishun Chamaria (defendant No. 2 and P. W. 1), (2) his brother Motilal Chamaria (P.W. 5) and (3) their common relation Ratanlal

Chamaria (P.W.2) & their interest therein during that period was in the ratio of six annas, six annas and four annas respectively. In 1943 the

plaintiff company while they were in that state entered into a new adventure under the name and style of Calcutta Match Works, Katihar, and that

was located on the newly purchased land of the plaintiff though with this difference in the contention of the parties in that regard that according to

the plaintiff it was located only on the Schedule B land while according to the defendant on the whole of the aforesaid 27 bighas, 5 kathas and 18

dhurs of land.

Then came the next development, that is, on 23rd March, 1944, this new business was converted into an independent private limited company

under the name and style of Calcutta Match Works (India) Ltd. with their head office at 178 Harrison Road, Calcutta, who are in this case the

chief contesting defendant and are represented on the record by the Official Liquidator Mr. M.M. Chakraverty. This transfer of match factory from

the plaintiff to the defendant was effected by a parole sale whereby its entire running concern along with its stores and stocks lying in the godown

as also the various buildings then standing on Schedule B land were made over to the defendant company on 1st June, 1944 and they in lieu

thereof on the same date gave to the plaintiff a sum of Rs. 6,00,000/- but that was only in the form of book adjustments.

Thus, since then the factory admittedly became the property of the defendant company and the plaintiff company ceased to have any concern

therewith. It has, however, to be noted that till that point of time the defendant''s shares were also held by the same three Chamarias and that too in

the same ratio. Therefore, though in law the aforesaid transaction of sale was from one limited company to the other but inter se between the

share-holders it was more a question of form than substance, their interest in the two being the same and identical.

But thereafter some difference and disputes arose between them and that led to a new deal in the course of which Ratanlal Chamaria (P.W. 2)

came to hold all the shares of the plaintiff company and Motilal Chamaria (D.W. 5) all the shares of the defendant company with no interest left in

either of them in favour of the third share-holder Radha Kishun Chamaria (Defendant No. 2). Thus, the interests of Ratanlal Chamaria and Motilal

Chamaria in the two companies since then became divergent and conflicting; and though in the meantime the defendant company while in the hands

of Motilal was soon closed and then went into liquidation yet the friction between them has been smouldering all along.

The reason for this, as suggested by the plaintiff, is that the liquidation was all a faked affair and as a matter of fact it was brought about by Motilal

himself in order to serve his own ends and I think there is some substance in it for it cannot be ignored that it was at the instance of Ramkumar

Sakseria (D. W. 2), the creature and servant of Motilal, that the liquidation proceeding initially started and finally it was Motilal himself who again

purchased it back from the Official Liquidator in an auction sale held in that proceeding and perhaps that is why that though on the records of this

case the parties arrayed on the two sides are the two companies but the persons who have taken leading and effective part on one side are

Ratanlal and his men while on the other Motilal and his employees, the controversy being as to whether the oral sale made on 1st June, 1944 for

the aforesaid consideration of Rs. 6,00,000/- was confined to its machineries, buildings and moveable stocks alone or that the same included

therein the land too which was purchased by the plaintiff on 9th April, 1935.

4. The case of the plaintiff company is that the consideration of Rs. 6,00,000/- paid by the defendant company to the plaintiff covered only the

price of machineries and other move-ables and in no case that of the land or any part thereof and that the same did never constitute the subject-

matter of that parole contract though it is conceded that at the time of transfer possession over Schedule B land, whereon according to the plaintiff

the machineries were then standing, was also given to the defendant to enable them to keep their business going as before without any break which

was to the advantage of all. Subsequently it is said, there was another contract between the parties which related exclusively to the land. That is

said to have been entered into on 7th June 1944 between Motilal on one side as the Managing Director of the defendant company and one

Jhunjhunwala on the other as the General Manager of the plaintiff company. Under that contract the parties are claimed to have agreed amongst

themselves that Schedule B land over which the defendant company were already then in possession would be sold to them and the defendant

company in lieu thereof would pay a sum of Rs. 60,000/- by the 31st December, 1950 and further in case of need the defendant company would

in future be entitled to purchase more land out of the remaining area in the aforesaid block if and when required on payment of its equivalent

market price. And according to the plaintiff it was in pursuance of this contract that the defendant company thereafter by a resolution of their

directors on 10th September, 1944, purchased the other land described in Schedule C and agreed to pay for that a sum of Rs. 12,000/-.

5. Unfortunately the original of this document is not on the record. It is said that it was left with Jhunjhunwala, who ceased to serve the company

since March 1945 and then died in 1949; and what has been brought on the record in its place is the so-called copy of it, namely, exhibit 2, which

reads as follows:

From:

The Managing Director,

The Calcutta Match Works (India) Ltd.,

7th June, 1944

The Managing Director,

Katihar Jute Mills Limited,

No. 1, Cullen Place,

Howrah.

Dear Sir,

With reference to our discussion with your General Manager Mr. Jhunjhunwalla regarding the plot of land belonging to the Katihar Jute Mills Ltd.

and occupied by us for the Match Factory buildings, we confirm the following arrangements finally decided with your Mr. Jhunjhunwalla:

1. That we shall pay you a sum of Rs. 60,000/- (Rupees sixty thousand) only as price of the land, situated on the South of your Mills" premises (on

the west side of your new extension) measuring 545'' X 545'' and covering an area of 20 Bighas 12 kathas 8 Chhataks and 25 feet latest by the

31st December, 1950.

2. That if we shall require any more land in future for the construction of a bungalow for our Manager, you will spare such required plot of land on

reasonable price or rent for it also will be paid by us along with the sum of Rupees sixty thousand mentioned above.

3. That the Khazana for the above lands will be paid by us regularly.

4. That on our making the abovesaid payments in time you will execute a Sale-Deed in favour of the Calcutta Match Works (India) Ltd.

5. That as long as it may be convenient for you, you will allow free entrance to our Match Factory through your Jute Mills premises. But in case of

your inconvenience we shall make our own separate gateways and passage without interrupting your Jute Mills Area.

6. That in case of our failing to pay you the above-mentioned amounts within the agreed period you will be at liberty to re-enter into the Match

Factory premises and re-occupy the lands. The buildings etc. over your lands which we have constructed or shall construct will then become your

own property. Thanking you,

Yours faithfully,

For and on behalf of

Calcutta Match Works (India) Ltd.

Sd. M. L. Chamaria.

Managing Director"".

But the way in which the genesis of its existence has been explained is on the very face of it not only not convincing but full of improbabilities. . The

plaintiff''s claim is that up to 6th February 1945 Radha Kishun Chamaria (P.W.1) was the Managing Director of the plaintiff company. Thereafter

Ratanlal came in office in his place since 7th February, 1945. He-on assuming office on 2nd March 1945 made certain enquiry from Jhunjhunwala

as to the position of Schedules B and C land inter se between the plaintiff company and the defendant company.

Jhunjhunwala in reply thereto is said to have addressed a letter dated 3rd March 1945 to Ratanlal Chamaria sending along with it a copy of the

aforesaid contract dated""7th June, 1944. But it is surprising that even if it was so, why Jhunjhunwala did not send the original as by then he had no

interest left to maintain the original with him. The only other document, besides the oral evidence, that has been relied upon on behalf of the plaintiff

in support of this part of their case is their account books (exhibits 6 to 6 (b)) and resolution 9 of the defendant''s Board''s meeting held on 10th

September, 1944 (exhibit 8 (a)), which I have already referred to above.

The grievance of the plaintiff is that in spite of the aforesaid agreements no part of the consideration money has ever been paid to them with the

result, as already stated, that no document of sale conveying the same to the defendant has been so far executed and registered in favour of the

defendant. Therefore, according to the plaintiff, no title in Schedules B and C land and much less in the remaining area of 2 bighas and 1 katha has

ever passed to the other side. But in spite of it, it is said that the Official Liquidator while selling the factory threatened to sell the land also and then

the whole of it. Hence the suit on 25th May, 1953 for the reliefs as stated above.

6. In answer to this, the defendant have defended their possession mainly on the ground of an agreement said to have been arrived at between the

parties through letters dated 24th March, 1944 and 28th March, 1944, the latter being the reply of the former sent by S.K. Bhattar (D. W. 3) on

behalf of the defendant company as their Managing Director. Unfortunately the letter dated the 24th March, 1944 like the agreement dated the 7th

June, 1944 is also claimed to be missing, and in the absence thereof what has been brought on the record is only the so-called office copy of the

reply dated 28th March, 1944; and that has been given. further support by the entries made in their account books as also by some oral evidence

and the circumstance as alleged by them that they are in possession over the entire block of 27 bighas, 5 kathas and 18 dhurs including Schedules

B and C land. The copy of the reply dated 28th March 1944 reads as follows :

The Managing Director,

Katihar Jute Mills Ltd.,

No. 1, Cullen Place, 28th March, 1944.

Howrah.

Dear Sir,

We are in due receipt of your letter dated. 24th instant embodying the terms and conditions for the transfer of all the assets of the Calcutta Match

Works, Katihar to the Calcutta Match Works (India) Ltd., Katihar. As desired we beg to confirm the terms and conditions as below:

1. That the total plot of land measuring 27 Bighas 5 kathas and 18 Dhoors with all sheds, structures, buildings, machineries, tools and implements

and with all other assets and properties of the Match Works will be transferred to The Calcutta Match Works (India) Ltd., for a sum of Rs.

6,00,000/- (Rupees six lacs only) out of which Rs. 4,00,000/- will be the cost of the machineries etc. and Rs. 2,00,000/- will be the cost of land,

building, etc., standing thereon.

2. That the total price of Rs. 6,00,000/- as fixed will be paid within two years.

3. That the complete possession of all the assets and properties will be made over to us by you by the 1st June 1944, and thereafter the Calcutta

Match Works (India) Ltd., will be the owner of all the assets, machineries, lands, buildings, etc., and you will only be claimant for the price as

fixed.

(4) That you will arrange for the execution of sale deed for the total land of 27 Bighas 5 kathas and 18 Dhoors in the name of the Calcutta Match

Works (India) Ltd., at your earliest convenience. Thanking you,

Yours faithfully,

For & on behalf of

The Calcutta Match Works

(India) Ltd.

Sd/- S. K. Bhattar,

Managing Director.

Therefore, according to the defendant, the sale effected on 7th June 1944 is based on the agreement arrived at on the basis of the letter dated 24th

March 1944. That means, their claim is that the entire area of 27 bighas, 5 kathas and 18 dhurs was also included in that sale and it was for that

reason that on the day of sale not only the machineries but also the whole of the aforesaid lands including those given in Schedules B and C came in

their possession and have been since then in their use and occupation as their property.

As to the contract dated 7th June 1944, their case is that it is spurious and false, though in the alternative they have also pleaded that even if the

same be genuine, plaintiff cannot on that ground re-enter the land or the structures standing thereon as the option given therein was not exercised

for long even when the period of grace stipulated therein had expired. As to the second defendant, namely, Radha Kishun Charamia, it is enough

to say that he supports the plaintiff in full. So the contest, as already stated, is only between the plaintiff on one side and the first defendant on the

other.

7. The trial Court in the course of its discussion has rejected the defendants" case as to their claim of possession over the entire area of 27 bighas,

5 kathas and 18 dhurs. Its finding on that point is that though the defendant are in possession of Schedules B and C land, as stated by the plaintiff

also, but they have got no possession over the remaining area of 2 bighas and 1 katha and the same is in the possession of the plaintiff. But in spite

of this finding, which prima facie is not consistent with the defence case, the trial Court has come to the conclusion that the agreement dated 24th

March 1944 is the basis of the sale effected on 1st June 1944 and that the agreement dated 7th June 1944 relied upon by the plaintiff is spurious

and not reliable and that, therefore, the defendant in their possession over Schedules B and C land are protected by the doctrine of part

performance as provided in Section 53A of the Transfer of Property Act.

8. It is not contested and in fact cannot be that if the agreement of transfer is not in writing, Section 53A cannot be applied. Therefore, on the facts

of this case, as admitted and proved, it is necessary for the defendant to establish that there was an agreement in writing as stipulated in the letters

dated 24th March 1944 and 28th March 1944 and in case they fail therein their claim on the basis of part performance, as provided in Section

53A of the Transfer of Property Act, has to be rejected. Unfortunately in the Court below the case was not approached on this basis. What the

trial Court, in substance, thought was, that of the two agreements dated 24th March 1944 and 7th June 1944 one must be correct and, therefore,

if it was found that the contract relied upon by the plaintiff namely, the one dated 7th June 1944 was unreliable, the other dated 24th March 1944

was to be held genuine; accordingly it says :

The admitted position is that there was an agreement in writing between the parties. The difference, however, is in the date, manner and the

contents of the agreement.

and thereafter having set out the difference finds :

After hearing the learned pleaders for the parties in support of the respective cases and having given my anxious consideration to the evidence and

to their arguments I have come to the conclusion that the plaintiff''s version of the agreement cannot be accepted and further, that though the

evidence in support of the agreement put forward on behalf of the defendant company is not quite satisfactory it is supported by much better

evidence and circumstances and has to be preferred and accepted as the only alternative to the agreement alleged by the plaintiff there being

admittedly an agreement in writing.

In my opinion, this approach is not only not correct but one wholly perverse & inconsistent with law. It may be that by implication the parties

agreed that there was an agreement in writing but for that reason it cannot be assumed or supposed that the same was necessarily either this or that

and not a third one different to both or none in case the parties fail to prove any. Then another error committed by the trial Court is that in finding

out as to which of the two agreements is genuine, it first falls on the agreement dated 7th June 1944 relied upon by the plaintiff and having found

that the evidence given in support thereof on behalf of the plaintiff is not reliable conveniently concludes that then in that case the evidence on the

other side must be true.

The result is that apart, from the wrong approach, no independent discussion has been made on the evidence given by the defendant, In appeal,

therefore, credibility or otherwise of that evidence has to be judged on its own merits without any substantial assistance from the judgment of the

trial Court. In doing it I first take up the oral evidence. That is com-posed of four witnesses, namely, (1) Jagdamba Prasad Sharma (D. W. 1), (2)

Ramkumar Sakseria. (D. W. 2), (3) S.K. Bhattar and (4) Motilal Chamaria (D. W. 5). (After discussing the evidence of these witnesses his

Lordship concluded :) So in my view of the matter, none of the D. Ws., referred to above, can be acted upon. And in saying this I am not

unconscious that as a rule of practice, as laid down in Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, , certain presumption

has to be given to the appreciation made by the trial Court as laid down in AIR 1949 32 (Privy Council) ; Bombay Cotton Manufacturing

Company Ltd. v. Motilal Shivlal 42 Ind App 110: AIR 1915 PC 1 (C) and Watt or Thomas v. Thomas 1947 AC 484 (D), but in this case, for the

reasons already stated, the discussion made by the trial Court, apart from being perverse, is neither sufficient nor proper. Hence I am constrained

to come to my own independent judgment.

9. Next it has to be remembered that the letter (exhibit E), as stated by Bhattar, was written by the plaintiff. He in his examination- in-chief stated :

A letter signed by the plaintiff company regarding agreement was sent to defendant company. By a letter signed by me as a Managing Director the

defendant company confirmed the said agreement towards the end of March 1944.

Unfortunately, the original letter dated 24th March 1944, as we know, is not on the record and what is there including the statement of the

aforesaid defendant''s witnesses is in the nature of secondary evidence only. Therefore, as such, the evidence of these witnesses has been attacked

on the point of admissibility also; firstly on the ground that in a case based on Section 53A of the Transfer of Property Act it is only the original

writing referred to therein that can be relied upon and not any secondary evidence of the same and secondly on the ground that even if the

secondary evidence be held admissible in law that cannot go in unless the conditions for the same are complied with.

10. In my opinion, so far as the first contention is concerned, that is without sub-stance. The doctrine of part performance as provided in Section

53A of the Transfer of Property Act forms part of the substantive law and as to how far the writing referred to therein is to be proved is a question

to be decided by procedural law. Therefore, there is no substance in the first contention and if any authority is needed in support of this view, I

may cite here the decision of Hormasji Jamshedji Ginwalla Vs. Maneklal Mansukhbhai, , where Divatia J. has laid down :

If a contract requires to be reduced to writing and signed, it itself must be proved by primary or secondary evidence and its terms must be

determined from the contract itself and not from what purports to be its quotation in another document.

But as to the second I agree that in the case of a document no secondary evidence can go in unless it is proved, as is claimed here, that the original

has been destroyed or lost and secondly that so far as the oral account of its contents is concerned, it must be by a person who has himself seen it

implying that he has read it as laid down in Section 63(5) of the Evidence Act. Now on the question of loss and destruction, the learned

Subordinate Judge in his judgment says :

""I am, therefore, prone to accept the explanation offered for the non-production of the agreement as offered on behalf of the plaintiff company. I

am further inclined to accept the defence version about the existence of such a letter which was confirmed by Ext. E because the story in this

respect propounded by the defendant company is more natural and probable and in keeping with the natural conduct of the parties.

In this passage at least the last expression is not clear to me and the material relied upon in support of this conclusion is in these words:

For this an explanation was given on behalf of defendant No. 1 namely, that this document was missing and that in all probability this document as

also many other important documents relating and belonging to the defendant company have remained in the custody of Ratanlal Chamaria, who

was for sometime the Managing Director of the defendant company.

But nowhere in the judgment there is any finding given by him that in fact Ratanlal was ever the Managing Director of the defendant company. On

the contrary, what he says about it is:

I have indeed found it difficult to come to a definite conclusion.

Therefore, there is no foundation for the so-called explanation as is supposed to have been given by the defendant; rather the materials as they

stand on the record, particularly the minutes of the meetings of the Board of Directors held on 19-5-44, 10-9-44 and 26-3-45, already referred to

above, show otherwise. Then it has to be remembered that according to Bhattar the defendant company closed their works sometime in 1946.

Therefore, if Motilal Chamaria was the Managing Director as disclosed by the minutes up to 26th March 1945 then Ratanlal could assume that

office only in between 26th March 1945 and the time when the defendant company closed. Unfortunately, there is no reliable evidence, either

documentary or oral, to show that even during this period Motial Chamaria was not the Managing Director or that if he was not his place was then

taken by Aatanlal Chamaria.

Therefore, it cannot be accepted that the explanation given by the defendant is at all true; and perhaps the trial Court was also not fully convinced

of it, otherwise it was not necessary for it to go completely out of way in finding out any additional ground in support of it which is not borne out by

the records of the case. The additional ground given by it is in these words :

Motilal Chamaria was undoubtedly voted to be the Managing Director but he never actually managed and the real Manager had been S.K.

Bhattar. It is also proved that later on Ratanlal Chamaria held 10 out of 16 shares in the defendant company and must have been a powerful factor

exercising effective control in the affairs of the defendant company

meaning thereby perhaps that even if Radha Kishun Chamaria was not the Managing Director he had at least an effective control over the affairs of

the Company. Therefore, it was nothing impossible for him to take out the original from there. Unfortunately, this is not the defendant''s case;

neither there is anything on the record to suggest as to what was the nature of the so-called powerful factor and as to how that powerful factor

worked out in securing to him the document. In my opinion, it is nothing but conjecture and then it is negatived by the following observation:

..... it is admitted by some of the defence witnesses that the documents mainly remained in the custody of the General Secretary and the General

Manager of the defendant company under lock and key until it went into liquidation. The Official Liquidator or the Receiver took possession of the

assets of the defendant company but the list of documents taken possession of has not been produced.

Further if it is so that the documents originally used to be in the custody of the General Secretary and the General Manager and thereafter on the

liquidation of the company they came in possession of the Official Liquidator and the Receiver then it was incumbent on the defendant to examine

them to explain as to how that document came to be lost or destroyed. But unfortunately no serious attempt was ever made at the trial to examine

any of them or to give any explanation for not doing the same. Still the Court instead of drawing any adverse inference against the defendant for not

doing that quietly concludes in their favour that

The resultant factor, therefore, makes it quite probable that in this sudden change over from the Calcutta Match Factory to the Calcutta Match

Works (India) Ltd. and then its liquidation and going into the possession of the official liquidator or the Official Receiver, this important document,

namely, counter part of Ex. E might have been misplaced."" And thus on a finding based on ''might'' it holds that the explanation given by them is

proved.

I must say that it has set me thinking as to whether it can at all be an approach of a judicial mind especially when on the record there is not one

direct statement made by any of the defendant''s witnesses on the point of loss or on the point that the defendants in their attempt to produce the

same made any diligent search for it and exhausted all their sources and means available for its production. If that is so then the finding given by the

trial court on the question of explanation cannot be sustained and in the absence of that explanation no secondary evidence can go in.

Further in order that the secondary evidence in the form of oral accounts be allowed to be deposed, it is necessary that the witnesses giving the

accounts of its contents should first establish, as laid down in Section 63(5) of the Evidence Act, that they had seen it meaning thereby that they

had read it. But on this point also the defence evidence in the form of any positive statement on it is completely silent. Therefore, apart from merit,

on these two technical grounds also, the oral testimony of the aforesaid defendant''s witnesses has to be discarded from consideration, as laid

down in Kalenther Ammal v. Ma Mi ILR 2 Rang 400 : AIR 1924 Ran 363 (F) affirmed by the decision of the Privy Council in AIR 1927 15

(Privy Council) .

11. Then comes the letter dated 28th March, 1944. That suffers from a glaring flaw that the case pleaded in the original written statement filed on

19-8-1953 is not based on that footing nor is there any reference of this letter in that written statement. It appears that subsequently it was realised

by the defendants that on the materials on the record: it was difficult for them to prove the contents of the so-called letter dated 24th March, 1944,

and, therefore, on 16th November, 1954, they filed an additional written statement along with a petition. Therein for the first time a reference was

made to the letter dated 28th March 1944. The reason for not pleading this letter in the original written statement is given in paragraphs 3 and 4 of

the petition filed along with it. They read:

3. At the time when your petitioner filed the above written statement all the papers and records were not in the possession of the Official

Liquidator and / or could not be found in spite of diligent searches.

4. The Official Liquidator now finds from the records that the contract mentioned in paragraph 5 of the written statement was contained in a letter

dated the 24th day of March, 1944 written by the plaintiff to the defendant company. The said terms were confirmed in writing by the defendant

company by a letter dated the 28th March, 1944 written to the plaintiff. The Official Liquidator has found the office copy of the said letter dated

28-3-1944 but has been unable to find the said letter dated the 24th March, 1944.

Mr. Das has strongly challenged the authenticity of the facts stated in these paragraphs. His main ground of attack is that they were not proved at

the trial either by Manmatha Nath Ghosh, who is said to have verified the additional written statement, or the Receiver himself. Then what is further

surprising in this connection is that if it were true that the letter dated 28th March, 1944 was found subsequently after a search made in the office,

how is it that the more important letter dated 24th March, 1944 was also not found along with it. In the usual course it is reasonable to expect that

both these letters being related to the same matter should have been placed in the same file. Unfortunately there is nothing on the record to explain

as to why the copy of one could be found and not the original of the other. Therefore, it adds to my doubt that such a letter as a matter of fact

never existed nor was ever read or seen by anybody and even if existed it never bore the signature of any person duly authorised by the plaintiff

company. Lastly the existence of such an agreement is belied by the resolution passed in the second meeting of the Board of Directors held on

10th September, 1944. That reads as follows:

That the construction work of family quarters for Officer and staff, messing house for non-family man and coolie-shed are to be immediately taken

up to suitable lands in consultation with Gen. Manager of M/s Katihar Jute Mills Ltd., plans for officers'' quarters are to be submitted to Mr. S.K.

Bhattar for sanction"".

If the defendant''s story were true and if they had already purchased all the land which the plaintiff had, there was no occasion for them to have any

further talk about it with the plaintiff company. This resolution by implication is more in consonance with the story put up by the plaintiff than the

one relied upon by the defendant. Then if the evidence of defendant''s witnesses is discarded, as it has to be, there is nothing left to support the

defendant''s contention that the letter dated 28th March, 1944 is the copy of one addressed to the plaintiff company and even if it be so, it cannot

go in as secondary-evidence of the letter dated 24th March, 1944 as contemplated by Section 63(4) of the Evidence Act; for the rule of law is that

in the case of such agreements it is only when each of the instruments is duly signed by the party to be bound by it, and delivered to the other, that

the documents are termed counterparts, and it is only then that each is evidence against the party executing it and those in privity with the executing

party and each is secondary evidence of the other. Here on the finding given by me there is no material to support that the letter dated 24th March,

1944 was signed by the plaintiff and that the parties had delivered to each other the letters dated 24th March, 1944 and 28th March, 1944. As

such there is no substance in the contention raised by the learned Advocate General that it should be used as secondary evidence u/s 63(4) of the

Evidence Act.

12. For all these reasons I hold that the defendant company have failed to prove that the plaintiff had contracted to transfer the land in dispute by

any writing signed by them or on their behalf from which the term necessary to constitute transfer can be ascertained with reasonable certainty and,

therefore, the case pleaded in the court below on the footing of Section 53A of the Transfer of Property Act tails.

13. In this Court, however, the judgment has been supported more on the footing of what the learned Advocate General has described as the

doctrine of equitable estoppel. His contention is that even if there is no writing but if it is proved that a vendee for consideration has been put in

possession of the land sold to him he cannot be ejected if the case of equitable estoppel is made out against him and in any case not without

praying the consideration already received by the vendor.

In other words, his contentions are threefold -- (1) that on the facts of this case it is proved that the plaintiff did sell the land to the defendant

company if not in writing at least orally and that the consideration of Rs. 6,00,000/- paid to them on 1st June, 1944 was for the land also; (2) that

on the facts of this case the doctrine of equitable estoppel does apply and, therefore, the defendant are protected in their possession even in the

absence of any writing and (3) that in any case the plaintiff cannot get back possession as they have not surrendered the price of the land already

received by them.

In my opinion, apart from fact, on law alone this alternative contention also cannot be sustained. Firstly for the reason that the doctrine of equitable

estoppel, even if there is any such doctrine, in ultimate analysis rests either on contract, express or implied, or upon some statement of fact

constituting an estoppel and secondly that there is no estoppel against statute. In English Law an agreement for sale of land creates an equitable

interest in that land in favour of the vendee and as such if an agreement for sale of land be proved, a Court there on the principle that ""Equity looks

on that as done which ought to have been done"" may give relief to the vendee even if there is no document in writing.

But in Indian Law a contract for sale of Immovable property does not create any interest either equitable or legal but only a right, which if not

enforced in time, as in the present case, is not of any avail to defend possession even if already delivered on that basis, Therefore, in this state of

law, the so-called doctrine of estoppel cannot come into play. In fact, this aspect of the case now stands finally concluded by the decisions in AIR

1931 79 (Privy Council) and AIR 1934 235 (Privy Council) .

In the former, Lord Russell of Killowen having discussed the doctrine of equitable estoppel, explained in Gregory v. Mighell (1811) 18 Ves 328

(J) and Ramsden v. Dyson (1866) 1 HL 129 (K), finally observed:

Even if any such equity was established, their Lordships are of opinion that it could not operate to nullify the provisions of the Indian Code relating

to property and transfers of property.

And in the latter Lord Macmillan dealing with a case similar to the one we have here laid down:

The result is that, under the law applicable to the present case, an averment of the existence of a contract of sale, whether with or without an

averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India"".

In the latter discussion the case was one to which Section 53A of the Transfer of Property Act did not apply. Therefore, its ratio decidendi was

that independent of that section no relief could be granted to a defendant on an averment of the existence of a contract of sale either with or

without an averment of possession following upon that contract. Here, as already held above, the doctrine of part performance as laid down in

Section 53A of the Transfer of Property Act is not applicable as in this case there is no writing as contemplated in that section. If that is so then in

view of what have been held in the aforesaid two cases, any other defence based on equitable consideration cannot succeed.

14. Then there is another aspect of the case, namely, that even if it be accepted that there was an oral sale between the parties as to the land in suit

and that the doctrine of equitable estoppel does apply in spite of Section 54 of the Transfer of Property Act then on the facts of this case it cannot

be denied that both the parties were all along fully aware of the true nature of the transaction between them and their respective stand in regard to

the land in suit. Therefore, on that ground also the case of estoppel by acquiescence as explained in Wilmott v. Barber (1880) 15 Ch. D. 96 (L)

cannot apply here.

15. Lastly even on merit also, there is no reliable material to prove that any consideration passed for this land or that the possession over the same

was ever given to the defendant on the basis of any contract or transaction of sale. On the point of consideration reliance has been placed, apart

from the oral evidence already discussed above, on the entry made in the account books of the defendant which have been appended to their

written statement as also on the circumstance that they paid rent at least for one year, namely, 1353 fasli.

As to the former, it is enough to say that they suffer from all those defects which as stated by the trial Court are to be found in the case of the

plaintiff''s account books; for example, in the defendant''s khata also there are a number of blank pages both in the beginning and at the end and

therein also only two or three pages have been utilized to write the account. And if the trial Court on these grounds thought it advisable to reject the

plaintiff''s account, I see no reason why on the same principle defendant''s account should also not be rejected.

Further these accounts books are private documents and if the other evidence on the record in support of the defendant''s case is not reliable, can

it be said that they are free from doubt? I think not. Then so far as the payment of rent is concerned, that suffers from the fact that the payment, if

any, was only for one year, namely, 1353 fasli. There is no receipt showing that the defendant paid rent for any of the years subsequent to it. It

may be that in the first year of purchase the payment was made by the defendant company as the share-holders in the two were the same and

hence it did not matter much whether the rent was paid from the account of this Company or that Company.

And if in fact it was paid in assertion of their title, as they claim, they should have paid for other subsequent years as well. I, therefore, think that

this solitary payment for 1353 fasli cannot be any conclusive proof of the claim made by the defendant.

16. Then comes the question of possession. As to that it is said that admittedly Schedules B and C lands have been all along in possession of the

defendant company. Therefore, that is consistent with their case. In my opinion, this admitted possession is not so simple for there is an explanation

given by the plaintiff which, as already stated above, stands supported by one of the resolutions of the Board. Then, as already stated above, the

finding given by the trial Court that the remaining area of 2 bighas and 1 katha is in the possession of the plaintiff is not at all consistent with the

defendant''s case.

Therefore, it cannot be said that the possession over Schedules B and C lands had been given to them on the basis of the so-called sale as alleged

by the defendant. Lastly in support of the oral sale, reliance has also been placed on the plaintiff''s own account. Therein exhibit 6 (b) shows that

Rs. 2,00,000/- out of Rs. 6,00,000/- was the price of ""the cost of the newly constructed building for installation of the Match Factory together

with the building of old godown and goods and store kept therein sold to the limited company.

Relying on this entry the learned Advocate General has contended that in law the sale of the building stood and for this proposition reference has

been made to the decision in Kshirode Chunder Ghosal v. Saroda Prosad Mitra 12 Cal LJ 525 at p. 535 (M). In that case Mookerji J. observed.

""The third and last point, which now requires consideration, relates to the extent of the dwelling-house. The learned vakil for the petitioners has

contended that the term ''dwelling-house'' includes, not merely the actual structure, but also the Land upon which the structure stands, and so much

of the adjoining land as is necessary lor the convenient use and occupation of the house as a dwelling-house"".

But it has to be noted that this argument was based on the special provision of law as laid down in Partition Act IV of 1893. It is with regard to

that Act that it has been held that the term ''dwelling-house'' includes not merely the structure or building but also adjacent buildings, curtilage,

garden, courtyard, orchard and all that is necessary for the convenient occupation of the house. Therefore, that case stands on its own fact and is

not applicable to what is in controversy here.

Generally any sale of a building without any specific reference to the land whereon it stands cannot necessarily convey the land along with it and

what is provided in Section 8 of the Transfer of Property Act as to easement cannot apply to the land on which the buildings stand for there is no

easement in law which gives any exclusive and unrestricted use of land and if the grant is exclusive and unrestricted, it beyond all questions passes

the ownership of the land.

17. Therefore, looked at from any point of view the case of equitable estoppel also fails. That being so, the only question that now remains to be

considered is as to whether the plaintiffs are entitled to get any relief as prayed for on the basis of the contract dated 7th June, 1944, as relied upon

by them, or, in the alternative, on the basis of title as admitted by the defendant.

18. So far as the contract dated 7th June, 1944 is concerned, that has been held by the trial Court as unreliable and in support thereof a number of

reasons have been attributed by it. Some of them no doubt, as contended by Mr. Das, are not very correct; for example, it is stated in the

judgment:

I find that all this fuss of an explanation for the non-production of the original falls to the ground in view of the statement made by P. W. 2

Ratanlal, the present Managing Director of the plaintiff company, that he saw the original which is in his office and that the original along with other

papers had been made over to him. That statement of his would be found at page 9 of his deposition"".

But what the witness exactly stated at that page is :

I have seen the copy of the minutes, agreement between Katihar Jute Mills and Calcutta Match Works (India) Ltd., and some other papers.

These papers were handed over to me and thus I saw them. These papers were in my office. The above mentioned papers are with regard to

Calcutta Match Works (The learned lawyer for the defendant says that the witness spoke that the above-mentioned papers belong to Calcutta

Match Works).

And as the word ""copy"" used in this passage may refer both to the minutes as also the agreement between Katihar Jute Mills and Calcutta Match

Works (India) Ltd., so on this solitary passage it cannot be positively stated that thereby the witness meant to have seen the original and not the

copy. Similarly at another place the trial Court says :

As admitted by P. Ws. 1, 3 and 4 Motilal Chamaria was a Managing Director on paper only and that his nominee S.K. Bhattar had really been

managing the affairs of the defendant company"".

But the admissions made by P. Ws. 1, 3 and 4 cannot be taken to mean that Motilal Chamaria was not the Managing Director at all or that what

Motilal Chamaria (D.W. 5) stated in his evidence is true. Therefore, if Motilal was the Managing Director, as in my opinion he was, then the fact

that the document dated 7th June 1944 is signed by Motilal Chamaria cannot be a ground for holding that it is a forged or spurious document. On

the contrary, the probabilities are that a document like the one dated 7th June 1944 should have been signed by the principal and not by any

subordinate to the principal who was only to look after the day to day work. Lastly, in the course of discussion the trial Court says :,

It would be unreasonable and irrational to believe that the defendant company would pay such a heavy sum of Rs. 6 lacs for the machineries and

buildings leaving the land upon which they stand fixed up unpurchased. .....It is, therefore, unnatural to believe that the agreement with regard to the

land for a sum of Rs. 60,000/- only would be left undone until about a week after the company had started functioning.

This observation is again more in the nature of speculation than a finding based on evidence. Therefore, this also, as a valid reasoning for rejecting

the document dated 7th June 1944, fails. But the difficulty is that even if these be discarded from consideration, there are many more left which in

my opinion are more consistent with the findings arrived at by the trial Court than any contrary to it; for example, as already stated above, it is not

understandable as to why Jhunjhunwala should retain the original document with him even when he had already resigned from the office of the

plaintiff company.

Then the document being undoubtedly an important one, the probabilities are more in favour of the conclusion that the original must have been sent

to the Head Office at Calcutta and not left with Jhunjhunwala, as is stated by P. W. 1 also. Then it is very surprising that P. W. 2 in his evidence

says that he does not remember that he ever received a letter like Exhibit 2 or Exhibit 3. Further, as a matter of fact, there is no direct evidence on

the record as to the exact discussion the parties had which led to the contract incorporated in the so-called agreement dated 7th June 1944.

Lastly I agree with the trial Court that the evidence on the record does not justify any definite conclusion that a search of the original, as it ought to

have been done, was at all made in this case. Therefore, on the whole, it is difficult to give a definite finding that the plaintiff"s story though probable

in many other respects is also true so far as it relates to the genuineness of the so-called agreement dated 7th June 1944. Therefore, to that extent I

agree with the trial Court though not without the feeling that had it applied the same standard of test in examining the other agreement also, namely,

one dated 24th March 1944 relied upon by the defendant, much of this Court"s time would have been saved.

19. That, however, does not dispose of the case for there remains the admitted fact that the title of the land in suit is in the plaintiffs and the claim

on that basis is not barred by time; if that is so then in the absence of any valid transfer of that title the position of the defendant on these lands on

the facts of this case is nothing more than that of licencee and as such the plaintiff"s claim for their ejectment can (sic. cannot?) be rejected.

Unfortunately this aspect of the case for reasons already stated has not received any attention from the trial Court and in this Court it has been

challenged on the ground that there is no such case pleaded in the plaint and so the plaintiff are not entitled to any relief on that basis. In my

opinion, there is no substance in this contention. For though it is true that in the plaint much stress has been given on the so-called agreement dated

7th June 1944 and the cause of action has also been mainly framed on foot of that agreement but it is difficult to agree to this extent with the

learned Advocate General that the plaint does not make any reference of a case based on title.

Such a contention on the face of it stands strongly negatived by the averments made in paragraphs 2 and 3 of the plaint which as admitted in

paragraph 1 of the written statement are not untrue as also by the reliefs sought as to land in sub-paragraphs (a), (b) and (c) of paragraph 19 of the

plaint. Then apart from the rule that the pleadings in India, especially those from the moffusil, as held by the Privy Council in Kyi Oh v. Ma Thet

Pon, AIR 1926 PC 29 (N), are not to be construed very strictly, there is a specific provision laid down in Order 7, Rule 7 of the CPC which inter

alia reads:

Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for

general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall

apply to any relief claimed by the defendant in his written statement.

The phrase ""general or other relief"" in this provision of law is an omnibus phrase wide enough to cover all such reliefs as are consistent with the

averments made in the plaint. Mulla in his commentary on Order 14, Rule 1, CPC (12 Edition) goes to the length of saying:

But where the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues, and they have been fully

put in evidence, and have formed the main subject of discussion in the Court, the Court may grant a relief though it may not be founded on the

pleadings..... But if a case not alleged by the plaintiff in his pleadings is disclosed in the evidence, the Court should not deal with it, unless a specific

issue is raised on it and the defendant is given an opportunity of meeting it: Parshram v. Miraji, ILR 20 Bom 569 (O) and AIR 1930 312 (Oudh) .

Similarly in his commentary on Order 7, Rule 7, Civil Procedure Code, at page 610 it is stated :

Where a relief is claimed upon a specific ground, the Court may grant it upon a ground different from that on which it is claimed in the plaint, if the

ground is disclosed by the allegation in the plaint and the evidence in the case Rasul Jehan v. Ram Sarun, ILR 22 Cal 589 (Q); Haji Khan v.

Baldeo Das, ILR 24 All 90 (R) and Ram Chandra and Another Vs. Jaith Mal and Others, . Thus, in a case in which a plaintiff claimed an easement

by prescription, and it was found that he was not entitled to the easement by prescription, their Lordships of the Privy Council dealing with the case

as a special appeal,"" decreed the claim on the presumption of title arising from a grant: Rajroop v. Abdool 7 Ind App 240 (PC) (T); Achul v.

Rajun ILR 6 Cal 812 (U) and Secretary of State v. Mathurabhai ILR 14 Bom 213 (V).

In my opinion, these rules, as I understand them, are in their own turn rooted in a larger principle, namely, that on one hand no party at the trial

should be taken by surprise and on the other in case of an alternative relief the same should not be such as to constitute any embarrassment at least

to the party pleading it. Here no question of surprise can arise for the entire defence as also the discussion in the judgment on the issue of part

performance is based on the assumption that the original title is with the plaintiff.

That being so, it is now too late for the Advocate General to contend that any relief on the basis of the original title cannot be given as there is a

mistake made in the plaint in confining the cause of action to the agreement dated 7th June 1944 alone and not making it wide enough to cover the

case based on the original title also. Therefore, I hold that though the contracts relied upon by the parties fail yet the plaintiff are entitled to so much

relief as relates to declaration of title and recovery of possession.

But as there are some structures standing on the lands and as those structures on the facts found by me have to be held as belonging to the

defendant, they are entitled to remove the same from there, for which they may apply to the trial Court for some time within a period of one month

from today,

20. The appeal is accordingly allowed with costs on terms as stated above and the judgment and decree of the trial Court are set aside.

21. Before, however, I leave the case, I am constrained to observe that the approach made by the trial Court in this case is not only fallacious and

palpably erroneous but it betrays complete confusion of the legal principles involved therein. I hope the learned Subordinate Judge will in future be

careful in not making himself a victim of such a glaring mistake.

Kanhaiya Singh, J.

22.I agree.